NUMBER OF CASE: 87-1715

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1987

HENRY H. HALE, INDIVIDUALLY AND ON BEHALF OF THE CLASS OF OTHERS SIMILARLY SITUATED, — PETITIONER

VS

ANN D. McLAUGHLIN, SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION — RESPONDENT

Supreme Court, U.S.
FILED
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CLERK

REPLY BRIEF

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TABLE OF CONTENTS

List of authorities	ii
Question of trial de novo	1
Question of discovery	4
Question of class action	6
Question of summary judgment	6

LIST OF AUTHORITIES CITED

CASES	PAGE(S)
Chandler v. Roudebush, 425 U.S. 840, 12 FEP Cases 1368 (1976)	2,3,4
Dred Scott v. Sanford, 19 Howard 393 (1857)	13
Forman v. Davis, 371 U.S. 178 (1962)	5
Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 25 FEP Cases 113	7

Statue and Rule:

42 U.S.C 2000e et. seq.	1,2,9,12
42 U.S.C. #1981	9
29 C.F.R. 1607, et. seq.	10
Federal Rules of Civil Procedures	
Rule 15(a)	5
Rule 23	9

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-1715

Henry H. Hale, Petitioner

vs

Ann D. McLaughlin, Secretary of Labor,

United States Department of Labor

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES OF APPEAL

FOR THE SEVENTH CIRCUIT

REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION

I

Respondent puts (Res. 5-6) an interesting spin on the issue of whether I have a right to a trial de novo as private sector employees enjoy under Title VII.

I never did contend that Chandler v. Roudebush, 425 U.S. 840, 12 FEP Cases 1368 (1976) provided me with an unqualified right to trial. However, I did claim that Chandler established that federal employees have the same right to de novo review of Title VII claims in district court that state and private sector employees have. I exercised that right by timely filing suit in federal district court. Once there, the Federal Rules of Civil Procedure apply. The Rules didnot apply in the administrative proceedings before the Equal Employment Opportunity Commission.

That is why Chandler noted that "the testimony before the Labor Subcommittee reflected a general lack of confidence in the effectiveness of the complaint procedure on the part of federal employees. Complaints have indicated skepticism regarding the EEOC's record in

obtaining just resolution of complaints and adequate remedies. This has, in turn, discouraged persons from filing complaints with EEOC for fear that doing so will only result in antagonizing their supervisors and impairing any future hope of advancement."

Moreover, Chandler shares the thoughts of Senator Dominick stating, inter alia: "Determination of employment civil rights desires and requires non-partisan judgment. This judgment is best afforded by federal court judges who, shielded from political influence by life tenure, are more likely to withstand political pressures and render their decisions in a climate tempered by judicial reflection and supported by historical judicial indepence."

Therefore, since the lower courts erroneously concluded that Title VII did not accord me, a federal employee, the

same right to a trial de novo as private sector employees enjoy, their judgment should be reversed and the case remanded for further proceedings consistent with Chandler.

II

Respondent argues (Res. 6) that the district court did not err in granting summary judgment for respondent without granting me an opportunity to conduct discovery because I did not seek a continuance.

This argument ignores the fact that my attorneys placed before the district court a request for discovery and opportunity to amend complaint (Pet. App. 155-156). The record shows that the court did not address my attorneys' request. Therefore, I did not obtain any (emphasis added) discovery throughout the

pendency of the case.

In addition, it is my considered opinion that the epistle before the court should have been considered as a motion to amend complaint and governed by Rule 15(a) of the Federal Rules of Civil Procedure.

Rule 15(a) of the Federal Rules of Civil Procedure provides that a party desiring to amend his pleading after a responsive pleading has been served may do so "only by leave of court....and leave shall be freely given when justice so requires."

This Honorable Couret stated in Foman v. Davis, 371 U.S. 178, 182 (1962): "The grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely

abuse of that discretion and inconsistent with the spirit of the Federal Rules."

At the time the district court granted summary judgment for respondent and dismissed my complaint, there was pending before the court a motion filed by my attorneys seeking, among other things, leave to amend the complaint and establish discovery. The court gave no indication that the motion was even considered. The court should have considered and ruled on the requests before it.

Justice and fairness dictates that the decision be reversed.

III

Regarding the class question, respondent appear to crow somewhat by contending (Res.7), "Since petitioner could not <u>even</u> (emphasis added by the writer) survive a motion for summary

judgment with respect to his own claims, it is apparent that he could not have provided adequate respresentation of the interests of the class."

Respondent could be premature with that statement because somewhere I heard it said that it isn't over until its over and the fat lady has yet to sing.

The class issue has always been important to me because of the disparate impact theory rather than the disparate treatment theory. However, disparate treatment theory has been forced (emphasis added) upon me by the Equal Employment Opportunity Commission and the lower courts. I would not have hired counsel if I had known class action would have been denied me.

This Honorable Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 25 FEP Cases 113

(1981) noted that the factual issues involved in disparate treatment and disparate impact cases are not identical. A defendant in disparate treatmentr case, in order to prevail must articulate a legitimate, non-discriminatory reason for its action if an inference of discriminatory intent would be authorized. In a disparate impact case, however, rather than merely articulating a legitimate, non-discriminatory reason for its action, the defendant must produce evidence, and indeed bears the burden of proving that its action was a result of "business necessary." Imagine a federal agency being able to prove that discrimination was a "business necessary."

I would have retired almost a decade ago if the issue was only one of individual disparate treatment as

respondent contends. It is only the prayer that this action can proceed in a class action mode that mandates that I remain employed in order to establish the commonality required by Rule 23.

My efforts have been for other black professionals without my knowledge of Title VII. Therefore, if I fail in this class action effort, I am out of here! When I get out of bed each morning, the bulk of my salary is already earned. I would then direct my civil rights efforts from the private sector. I would work to get 42 U.S.C. §1981 coverage for the federal sector so they would not suffer the timeliness issue and also have the right to punitive damages as the private sector and able to get decent lawyers on a contingency basis which is a near impossibility in the federal arena. The right to equal opportunity is meanless

without legal expertise to implement it.

29 C.F.R. 1607 prohibiting employment practices that create a disparate impact that was promulgated jointly by the EEOC, the Civil Service Commission, the Department of Labor (emphasis added), and the Department of Justrice has been proven to be of little value in this instant case.

Something has to be wrong with a procedure that puts the Department of Justice on the side of the transgressor of Title VII and against the victim. On the other hand, the victim of private sector discrimination finds the Department of Justice on their side along with some of the best legal minds from the private sector because of the punitive damage provision of Section 1981.

One can readily understand why respondent would avoid class action like

the plague. The Department of Labor's Office of Federal Contract Compliance Programs ensures nondiscrimination by federal contractors. However, it is deplorable how it discriminates against minorities in its own employment.

From 1980 to 1983, the Department of Labor had a reduction-in-force of approximately 3,708 employees or 20 percent. These massive cutbacks resulted in job losses for 952 minorities and 1,785 women-i.e., 74 percent of the employed affected by the RIF were either minorities or female employees. In addition, minorities and females were underrepresented in the higher-paying positions. Only 3.5 percent of the GS 16-18 employees were minorities, and only 7 percent were females. In the SES levels, there was a 7 percent drop (emphasis added) in the participation rate for

minorities from 1980 to 1983.

During this point in time, the Department of Labor reduced the responsibility of its managers to implement affirmative action by changing the performance standard of managers regarding EEO responsibility from being a critical element in the previous administration to that of a non-critical element. Thus, sending a message to bigots that Title VII no longer mattered. This made managers eligible for top bonus money although they may have been found guilty of Title VII violations.

This is not strange to understand when one recalls that it was only a little over a century ago that this Honorable Court with Chief Justice Roger Brooke Taney writing on March 6, 1857 for a seven member majority stating, inter alia: "Negroes are beings of an inferior order,

and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they have no rights which the white man is bound to respect." See Dred Scott v. Sanford, 19 Howard 393 (1857).

Therefore, I am not surprised that respondent would state (Res. 3) that regarding the safety manager positions, I did not possess the minimum qualifications for the positions, when the record shows that I possess graduate hours in management and at least one of the successful applicants was a high school graduate but possessing the most important element-a white skin.

However, if I do not accomplish anything else, the Department of Labor will never again claim that I cannot express myself in written form. Leo Carey, OSHA Manager, who has risen to now

be in charge of all of the area offices (approximately 100) made that statement.

IV

Respondent states in footnote #4 (Res. 6): "In his petition (at 45-46), petitioner names one potential witness who allegedly would have testified regarding racist comments made by a member of the panel that denied petitioner certification status for an area directorship position. Petitioner, however, did not submit an affidavit from this potential witness in his opposition to the summary judgment and did not request a continuance in order to procure one."

Let the record show that the witness in question had transferred to Germany during the time in question. If I had the deep pocket of respondent, this would not have been a problem. However, this

witness in now stateside and it is my prayer that it is not too late.

It is therefore respectfully submitted in the above remarks that justice has not been served and the petition for a writ of certiorari should be substained.

Henry H. Hale, pro se

June 27, 1988